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In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

SANTIAGO DIAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLANT

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
GERALD P. NORTON,
Assistant to the Solicitor General,
STEPHEN F. EILPERIN,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the district court (J.S. App. 13–40)[1] is reported at 361 F. Supp. 1.

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[1] "J.S. App." refers to the appendix to the jurisdictional statement. "A." refers to the appendix to the briefs. The opinion is also reprinted in that appendix (A. 45–68), but without reflection of certain corrections made by the court (see J.S. App. 41–43). Those corrections have been incorporated in the opinion as officially reported.

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JURISDICTION

The judgment of the district court was entered on August 7, 1973 (A. 72). A notice of appeal to this Court was filed on September 5, 1973 (A. 75), and probable jurisdiction was noted on May 13, 1974 (A. 77). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the federal statutory requirement that an alien shall have "resided in the United States continuously" for five years in order to be eligible for the supplementary medical insurance program, 42 U.S.C. (Supp. II) 1395*o*(2)(B),[2] is consistent with the Fifth Amendment.

2. Whether the federal statutory requirement that an alien be "lawfully admitted for permanent residence" in order to be eligible for that program, 42 U.S.C. (Supp. II) 1395*o*(2)(B), is severable from the durational residence requirement and consistent with the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

[2] When the complaint was filed the provisions in issue were codified as 42 U.S.C. 1395*o*(2)(A)(ii), and they are so cited in the opinion of the district court. During the pendency of the action the structure, but not the substance, of Section 1395*o* was amended, and the provisions in question are now found at 42 U.S.C. (Supp. II) 1395*o*(2)(B), which is the designation we shall use.

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 1836 of the Social Security Act of 1935, added by Section 102(a) of the Health Insurance for the Aged Act of 1965, 79 Stat. 304, as amended, 42 U.S.C. (Supp. II) 1395*o*, provides:

> (1) is entitled to hospital insurance benefits under part A, or
>
> (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,
>
> is eligible to enroll in the [supplementary medical] insurance program established by this part [B].

STATEMENT

Appellees are Cuban refugees 65 years of age or older (A. 18). They were lawfully admitted to the United States in 1971. Appellees Diaz and Clara were not admitted for permanent residence, but were paroled into the United States by the Attorney General and remain here at his discretion, pursuant to 8 U.S.C. 1182(d)(5) (J.S. App. 17, n. 5). Appellee Espinosa has been lawfully admitted for permanent residence, but, like Diaz and Clara, has not yet resided in the United States continuously for five years (A. 18).[3]

[3] Appellees Diaz, Clara and Espinosa assert that they entered the United States, respectively, on February 4, 1971, July 8, 1971, and June 20, 1971 (A. 18, 33, 35).

On June 15, 1972, appellees Diaz and Clara applied to the Department of Health, Education, and Welfare for enrollment in the supplementary medical insurance program for the aged under Part B of the so-called "Medicare" Act (A. 30), an insurance program that covers part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. 1395j, *et seq.* The Part B program, which supplements the hospital insurance plan for the aged under Part A of the Act,[4] is supported in part by monthly premiums paid by eligible individuals who choose to enroll. 42 U.S.C. 1395r(b). The Secretary denied the applications of appellees Diaz and Clara on August 4, 1972, for failure to meet the "lawfully admitted for permanent residence" and five-year residency requirements applicable to aliens under 42 U.S.C. (Supp. II) 1395*o*(2)(B) if they are not eligible for benefits under Part A (A. 30; see p. 3, *supra*, n. 3).

[4] Benefits under Part A are available to every individual who is 65 or older and is entitled to monthly insurance benefits under 42 U.S.C. 402 or is a railroad retirement beneficiary under 45 U.S.C. 228s-2 (42 U.S.C. 426(a), (c), 1395c). Benefits under those programs depend primarily upon age and calendar quarters of covered employment. See 42 U.S.C. 414(a). But cf. pp. 23-24, *infra*, n. 23, discussing 42 U.S.C. 428. In addition, under "transitional eligibility provisions," residents of the United States who attained the age of 65 before 1968 or had at least three quarters of coverage for each year between 1966 and the year in which that age was attained are also eligible under Part A, subject, if an alien, to eligibility provisions identical to those in issue here. 42 U.S.C. 426a. Appellees Diaz and Clara applied for insurance under Part A, but were ruled ineligible (A. 30, 33-36). Appellee Espinosa would also appear to be ineligible. This action, however, challenges only the eligibility requirements for Part B (A. 17-20, 45, 66-67).

On August 18, 1972, Diaz, later joined by Clara and appellee Espinosa,[5] instituted this action in the United States District Court for the Southern District of Florida on behalf of himself and all persons in the United States who have been or will be denied enrollment in the Part B Medicare program by reason of their inability to meet the dual alien residency requirements of 42 U.S.C. (supp. II) 1395*o*(2)(*B*) (A. 17-20). The complaint sought injunctive relief against enforcement of those residency requirements and a declaratory judgment that they violate the due process clause of the Fifth Amendment in denying supplementary medical insurance benefits to aliens who do not meet the residency tests while providing such benefits to citizens (A. 20).

A three-judge district court was convened pursuant to 28 U.S.C. 2282 (A. 13-16). After holding that it had jurisdiction pursuant to 42 U.S.C. 405(g)[6]

[5] Espinosa applied for enrollment in the Part B program on October 26, 1972, (cf. A. 50). It was stipulated (cf. A. 50) that his application would be deemed denied for failure to meet the five-year residency requirement of 42 U.S.C. (Supp. II) 1395*o*(2)(B).

[6] Under 42 U.S.C. 1395ff(b):

"Any individual dissatisfied with any determination * * * as to entitlement under * * * part B * * * shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, in the case of a determination as to entitlement * * *, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title."

42 U.S.C. 405(g) provides in relevant part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such deci-

despite the absence of a final decision of the Secretary of Health, Education, and Welfare (J.S. App. 16), and, after certifying the suit as a class action (J.S. App. 16–20),[7] the court held that 42 U.S.C. (Supp. II) 1395*o* is unconstitutional under the due process clause, insofar as it denies Part B benefits to immigrant aliens for failing to meet a durational residency requirement which is not imposed on United States citizens (J.S. App. 32–33). The court also held that the requirement that an alien be "lawfully admitted for permanent residence" is not severable from the durational residence requirement and is therefore unconstitutional and unenforceable (J.S. App. 33–38).

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sion by a civil action commenced within sixty days after the mailing to him of notice of such decision * * *."

42 U.S.C. 405(h) provides:

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[7] The court certified a class consisting of all immigrants (*i.e.*, all aliens except those classified as non-immigrants under the Immigration and Nationality Act of 1952 (8 U.S.C. 1101(a)(15)) who are 65 or older and do not meet the requirements for Part B set forth in 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 50–51).

The court also certified a subclass consisting of all immigrants 65 or older who are not eligible to enroll in Part B solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 51).

Without deciding whether the more rigorous "compelling governmental interest" standard is applicable, the district court held that the Act's durational residence requirement does not meet the "rational basis" test (J.S. App. 20–25). The court questioned whether the limitation of aliens' eligibility imposed by the durational residence test could be justified by a congressional purpose to preserve fiscal integrity, in view of the fact that half the cost of the Part B Medicare program is financed through premiums paid by those who choose to enroll. In any event, the court concluded that general federal revenues could not be preserved by invidious discrimination between citizens and aliens (J.S. App. 27–30). To the extent that the durational residence requirement represents a congressional judgment that aliens residing temporarily in the United States should not receive supplementary medical insurance coverage if they are not eligible for Part A benefits, the court found the five-year residence requirement an overly-inclusive classification to accomplish that purpose (J.S. App. 30–32).

The court's judgment permanently enjoined the Secretary from enforcing the alien eligibility requirements of 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 70–72).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Exercising its power to spend for the general welfare, Congress established in 1965 the novel "Medicare" program of federal medical assistance to the aged, consisting of two basic parts. Part A provides hospital insurance benefits and Part B—the only pro-

gram at issue in this case—provides a voluntary supplementary medical insurance program financed in part by premiums paid by those who choose to enroll. The Part B program is open to all who are eligible for Part A, which in turn is available to all who are 65 years old and are eligible for retirement benefits under either the Social Security Act or the railroad retirement program, without distinction between citizens and aliens.

In addition, other 65 year old persons are eligible for Part B if they are residents of the United States, except that aliens qualify under this alternative basis of eligibility only if they (1) have resided in the United States continuously for the five years preceding their enrollment in the program and (2) have been "lawfully admitted for permanent residence." 42 U.S.C. (Supp. II) 1395*o*(2)(B).

Appellees are citizens of Cuba, older than 65, who came to the United States in 1971 and do not meet one or both of these dual requirements of eligibility for Part B.

2. These requirements are a rational and valid exercise of Congress' plenary power to determine the privileges of aliens in the United States, particularly with respect to social welfare programs.

a. In effect, both requirements limit eligibility of aliens for Part B (if they do not qualify by reason of being eligible for retirement benefits) to those who have demonstrated a substantial and enduring connection to the United States. The conditioning of an alien's exercise of a privilege of citizenship upon a period of residence was specifically anticipated by

the Framers of the Constitution, when they vested in Congress the power to grant naturalization.

Recognizing the unique legal status of aliens, who derive legal protection from both international law and United States law, Congress has made varied judgments in extending the benefits of citizens to aliens throughout our history. The requirements challenged here are thus part of a longstanding and widespread pattern of differentiation by Congress between citizens and aliens. A holding that these requirements are beyond Congress' power would threaten the validity of hundreds of provisions of the United States Code.

The question of the appropriate stopping point in drawing lines between the rights and privileges of citizens and those of aliens is essentially a political question the determination of which has been entrusted exclusively to Congress, subject to a very limited degree of judicial scrutiny.

b. The validity of the challenged eligibility requirements for Part B should not be judged by the constitutional standards applicable to state residency requirements or other state laws pertaining to aliens. A requirement of residence for a specified period within the United States does not interfere with a person's right to interstate travel, and implicates no constitutional freedoms. In addition, because of Congress' plenary power to deal with aliens, the power of the states to regulate with respect to aliens is extremely limited. Accordingly, while alienage may be an inherently suspect category when used as a basis for classifications under state laws, thereby warranting strict

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scrutiny, alienage is not a suspect basis of classification under federal law.

Moreover, alienage is not an inherently immutable or highly visible trait, such as race, color or sex, with respect to which a test of strict scrutiny and compelling governmental need has been considered appropriate when it is used as a basis of classification.

c. In holding the durational residency requirement for Part B unconstitutional, the district court erred in ignoring the unique status of aliens and the plenary power of Congress to legislate with respect to them. Moreover, the court's conclusion that that requirement lacked a rational basis was founded on an inappropriately hypercritical scrutiny of the law.

3. The court also erred in concluding that the requirement that certain aliens be "lawfully admitted for permanent residence" is inseparable from the durational residency requirement, and in holding the dual requirements invalid as an entity.

a. While the varied versions of the Medicare bill considered by Congress differed with respect to a residency requirement for Part B, they all included a "lawfully admitted" requirement. Hence, had Congress thought the residency requirement beyond its power, it is evident that it would nevertheless have enacted the "lawfully admitted" requirement, particularly in view of the fact that its elimination would leave Part B open to any resident alien, including a diplomat or an illegal entrant.

b. The district court's doubts as to the constitutionality of the "lawfully admitted" requirement were

unfounded, for the same reasons that the durational residency requirement is constitutional.

ARGUMENT

I. IN EXERCISING ITS PLENARY POWER OVER IMMIGRATION AND NATURALIZATION, CONGRESS DID NOT OFFEND DUE PROCESS BY PROVIDING THAT CERTAIN ALIENS MUST SATISFY A DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR SUPPLEMENTAL MEDICAL INSURANCE

A. THE LEGAL STATUS OF ALIENS IS UNIQUE

Aliens in this country, like Indians, occupy a "unique legal status * * * of long standing" in relation to the federal government. *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip op., pp. 16, 19.[*] An alien may enjoy "such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution * * *." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. The Court in *Harisiades* further described the unique legal status of aliens as follows (*id.* at 585-586; footnotes omitted):

> So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may

[*] Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait (cf. *Johnson* v. *Robison*, No. 72-1297, decided March 4, 1974, slip op., p. 13, n. 14; *Lindsey* v. *Normet*, 405 U.S. 56, 73), but is essentially a legal condition subject to change in most cases by action of the alien. Upon acquiring citizenship, one's former status as an alien becomes immaterial for most purposes. See *Schneider* v. *Rusk*, 377 U.S. 163.

> claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. * * *
>
> The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country." In addition to such general immunities they may enjoy particular treaty privileges.[9]

An alien is, of course, a "person" within the meaning of the Fifth Amendment (*e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 238; cf. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489) and the Fourteenth Amendment (*e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Truax* v. *Raich*, 239 U.S. 33, 39; *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419). But this does not mean that all legal distinctions between citizens and aliens are constitutionally barred. The Constitution itself grants numerous rights to the former that are withheld from the latter. See *Sugarman* v. *Dougall*, 413 U.S. 634, 651–652 (Rehnquist, J., dissenting).[10] And, in general "[u]nder our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." *Harisiades* v. *Shaughnessy*, supra, 342 U.S. at 586 (footnotes omitted).

[9] Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 64–65. See generally Roth, *The Minimum Standard of International Law Applied to Aliens* (1949).

B. CONGRESS HAS BROAD CONSTITUTIONAL POWER "TO FIX THE CONDITIONS UNDER WHICH ALIENS ARE TO BE PERMITTED TO ENTER AND REMAIN IN THIS COUNTRY"

This Court has frequently recognized that Congress has broad prerogatives to deal with the special problems of aliens, as a part of its plenary constitutional power over immigration and naturalization. Article I, Sec. 8, Cl. 4, of the Constitution explicitly vests in Congress the power to establish uniform rules of naturalization, and this Court has held that the power of the federal government to admit and exclude aliens is also an inherent, essential incident of the national sovereignty established by the Constitution. See, *e.g.*, *Chinese Exclusion Case*, 130 U.S. 581, 603–604; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705, 713; *Galvan* v. *Press*, 347 U.S. 522, 530–532; *Kleindienst* v. *Mandel*, 408 U.S. 753, 766.

Protraction of an alien's "ambiguous status within the country is not his right but is a matter of permission and tolerance," subject to "[t]he Govern-

[10] Indeed, the requirements that a person have been a citizen for nine years to become senator, and seven to be elected a member of the House of Representatives (U.S. Const., Art. I, Sec. 2, Sec. 3, Cl. 3), may be regarded as a form of durational residency requirements for aliens, at whom they were specifically aimed by the Framers. See, *e.g.*, 2 Farrand, *The Records of the Federal Convention of 1787*, 235–239, 268–272 (1966 rev. ed.).

ment's power to terminate its hospitality * * *." *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 586–587.

The benefits and burdens attaching to the status of aliens affect whether immigration to this country will be more or less attractive to citizens of other countries (cf. 2 Farrand, *The Records of the Federal Convention of 1787,* 235 (1966 rev. ed.)), and it is within Congress' power to determine whether and to what extent immigration of aliens is to be encouraged or discouraged. Accordingly, encompassed within Congress' "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration & Naturalization Service,* 387 U.S. 118, 123) is comparably broad power "to fix the conditions under which aliens are to be permitted to enter and remain in this country." *Flemming* v. *Nestor,* 363 U.S. 603, 616; accord, *Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 419.

By vesting in Congress the power to establish rules of naturalization, the Framers of the Constitution authorized it, in Madison's words, to "fix different periods of residence as conditions of enjoying different privileges of Citizenship * * *." 2 Farrand, *supra,* at 235. See also *id.* at 268 (remarks of Hamilton). In consequence, the alien in the United States "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson* v. *Eisentrager,* 339 U.S. 763, 770.

For aliens to achieve, through naturalization, the ultimate equality with citizens, Congress has since the earliest days imposed a residency requirement (now five years), to which other requirements have

since been added, such as the current requirement that an alien have been "lawfully admitted for permanent residence." 8 U.S.C. 1427(a).[11]

Moreover, while Congress has frequently extended rights or imposed burdens on "persons" or "individuals" without distinction between citizen and alien,[12] the United States Code contains literally hundreds of provisions reflecting precisely drawn distinctions between citizens and some or all aliens in the provision of both benefits and burdens.[13] As a result, while it may be true in a general sense that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society" (*In re Griffiths,* 413 U.S. 717, 722), even in those activities aliens have in some circumstances been exempted by Congress from such obligations of citizenship.[14]

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[11] The first naturalization law, enacted in 1790 (1 Stat. 103), imposed a requirement of two years' residence within the United States. In 1795 the residency requirement was changed to five years within the United States and one year within the state or territory in which the naturalization petition was filed. 1 Stat. 414.

[12] *E.g.,* 42 U.S.C. 402(a) (retirement benefits); 42 U.S.C. 1983 (protection of civil rights).

[13] An extensive survey of existing provisions of the United States Code differentiating between citizens and aliens will be included as an Appendix to our brief in *Hampton* v. *Mow Sun Wong,* No. 73-1596, certiorari granted, June 10, 1974. We will send a copy of that brief to appellees' counsel when it is filed.

[14] *E.g.,* 50 U.S.C. App. 454(a) (liability for military training and service limited to citizens and aliens admitted for permanent residence); 16 U.S.C. 781 (prohibition against certain fishing beyond state territorial limits applies only to citizens and persons owing duty to laws of the United States); cf. 19 U.S.C. 1586(e) (prohibition against unloading vessel within specified off-shore waters applicable only to citizens).

Similarly, in determining which of the "different privileges of Citizenship * * *" (2 Farrand, *supra*, at 235) aliens should have, Congress has drawn lines throughout our history, but not always the same lines. Congress has for some purposes extended privileges only to a citizen of the United States,[15] while for other purposes it has also extended privileges to aliens who have been "lawfully admitted for residence"[16] or who

[15] *E.g.*, 7 U.S.C. 1922(1), 1941(1), 1961(b)(1) (loans to farmers and ranchers: Section 1961(b)(1) held unconstitutional in *Gomez* v. *Butz*, D.P.R., No. 326-73, decided May 29, 1974, *sub nom. Ramos* v. *United States Civil Service Commission* (in which the Solicitor General has authorized an appeal); 7 U.S.C. 1158(c) (indirect protection against foreign expropriation of property); 10 U.S.C. 8285(a)(1) (appointment as officer in regular air force); 12 U.S.C. 1427(a) (director of home loan bank); 22 U.S.C. 910 (foreign service officer); 25 U.S.C. 399 (lease of unalloted mineral lands within Indian reservations); 28 U.S.C. 1391 (limitations on federal court venue inapplicable to aliens); 28 U.S.C. 1861, 1865(b)(1) (service on a federal jury; held constitutional in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal docketed No. 73-1915); 28 U.S.C. 1872 (right to jury trial in original action in Supreme Court, derived from 1 Stat. 73, 81); 42 U.S.C. 410(a) (inclusion of employment outside the United States as basis for entitlement to retirement benefits); 42 U.S.C. 1973 (protection of right to vote); 42 U.S.C. 1982 (right to purchase property); 43 U.S.C. 145 (sale of public lands); 47 U.S.C. 303(l), (Supp. II) 310(a)(1) (aliens generally ineligible for radio station licenses); cf. 69 Stat. 699, as amended, 1 D.C. Code 1102(2) (right to vote in District of Columbia). See also 5 C.F.R. 338.101, limiting competitive civil service employment to citizens or persons owing permanent allegiance to the United States, held unconstitutional in *Hampton* v. *Mow Sun Wong*, *supra*, and in *Ramos* v. *United States Civil Service Commission*, *supra*.

[16] *E.g.*, 10 U.S.C. 8253 (enlistment in air force in peacetime); 42 U.S.C. 428(a) (transitional eligibility provisions for retirement benefits).

have declared their intention to become citizens.[17]

At times, Congress has made explicit the foreign relations dimensions of legislation concerning aliens, as where it has conditioned the right of an alien to exercise certain privileges of a citizen upon reciprocal treatment of United States citizens in the alien's own country,[18] or where it specifically makes refugees from a particular country, such as Cuba, eligible for benefits to which they would not otherwise be entitled.[19]

Although the details vary, the dominant theme of the conditions imposed by Congress on aliens' eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and enduring connection with the United States. Aliens who satisfy that requirement have in the main been generously provided for and treated by Congress as if they had already achieved citizenship. Indeed, the solicitude with which Congress has treated aliens generally, and

[17] *E.g.*, 10 U.S.C. 311(a) (membership of males in United States militia); 30 U.S.C. 22 (exploration or purchase of public lands having valuable mineral deposits); 43 U.S.C. 161 (homestead land grants); 48 U.S.C. 1501, *et seq.* (ownership of land in territories or the District of Columbia).

[18] *E.g.*, 10 U.S.C. 7435(a) (leasing of naval fuel reserves); 15 U.S.C. 1126(b) (registration of certain trademarks); 26 U.S.C. 901(c) (deductibility of taxes paid to foreign governments); 28 U.S.C. 2502 (right to sue in Court of Claims); 42 U.S.C. 402(t)(2) (payment of retirement or disability benefits to aliens outside the United States); 46 U.S.C. 785 (suits in admiralty against the United States).

[19] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3) (Cuban citizens who entered as parolees are eligible for certain Job Corps programs otherwise open only to citizens and permanent residents of the United States).

Cuban citizens like appellees in particular,[20] demonstrates that, despite their temporary inability to vote,[21] it would be inaccurate to characterize them as being in a position of "political powerlessness." *Johnson* v. *Robinson*, No. 72-1297, decided March 4, 1974, slip op., p. 13, n. 14.

C. THE RESTRICTIVE STANDARDS GOVERNING STATE POWER TO LEGISLATE ON THE SUBJECT OF ALIENS ARE INAPPLICABLE IN ADJUDGING THE CONSTITUTIONALITY OF AN ACT OF CONGRESS CONCERNING ALIENS

Because the Constitution vests exclusively in Congress the plenary power to legislate with respect to immigration and naturalization, the power of the states to regulate the rights, conduct, and affairs of aliens is very limited. *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 66-68; *Graham* v. *Richardson*, 403 U.S. 365, 374-378; *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 646-649. In light of the *prima facie* absence of state

[20] See, *e.g.*, 42 U.S.C. (Supp. II) 1382c(a)(1)(B)(ii); 118 Cong. Rec. S17015-S17016 (daily ed., October 5, 1972) (amendment offered by Florida's Senators to extend eligibility for various federal programs to aliens "otherwise permanently residing in the United States under color of law," so as to include Cuban refugees paroled into the United States); 87 Stat. 524-525 (inclusion of Cubans in limited category of aliens employed by the United States to whom compensation may be paid). See also p. 17, *supra*, n. 19.

[21] In fiscal year 1972, more than 100,000 aliens became naturalized citizens. Annual Report of the Attorney General, p. 196 (1972). Many resident aliens at any given time are potential citizens and voters, and are frequently close relatives of voters, so that their interests cannot lightly be disregarded by members of Congress. The large volume of private bills benefiting aliens enacted each year (*e.g.*, 86 Stat. 1527-1568, *passim*) demonstrates that they are not lacking in meaningful political power.

power to legislate on the subject of aliens, this Court has indicated that classifications in state law "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, *supra*, 403 U.S. at 372 (alternative holding); *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 642; *In re Griffiths*, *supra*, 413 U.S. at 721. But, because federal power to legislate with respect to aliens is expressly conferred, the proposition that alienage is a "suspect" category subject to "strict scrutiny" is not properly applicable to federal legislation.

While it is generally held that the equal protection prohibitions of the Fourteenth Amendment are also embodied in the due process clause of the Fifth Amendment (*e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533, n. 5; but cf. *Currin* v. *Wallace*, 306 U.S. 1, 14), it does not automatically follow that a statutory classification enacted by Congress is to be judged by the same standard as a state statute containing the same classification. Since it is one of the "constitutional prerogatives" (*Sugarman* v. *Dougall*, supra, 413 U.S. at 648) of Congress rather than the states to determine the conditions under which aliens will be permitted to enter and remain in the United States, an Act of Congress concerning aliens may well be constitutionaal even though an identical state statute would be invalid. Cf. *Head Money Cases*, 112 U.S. 580, 591-594; *Oyama* v. *California*, 332 U.S. 633, 646; *Richardson* v. *Ramirez*, No. 72-1589, decided June 24, 1974, slip op., pp. 28-29.

Compare *Roth* v. *United States*, 354 U.S. 476, 503–505 (Harlan, J., concurring in part).

D. THE JUDICIAL ROLE IN REVIEWING FEDERAL SOCIAL WELFARE LEGISLATION PERTAINING TO ALIENS IS EXCEPTIONALLY LIMITED

As this Court has repeatedly observed, federal "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. Such policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588–589. "[T]hat the formulation of these policies [toward aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. See *Lees* v. *United States*, 150 U.S. 476, 480. Indeed, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589), even when "First Amendment rights are implicated * * *" (*Kleindienst* v. *Mandel*, *supra*, 408 U.S. at 765) by the federal action concerning aliens.

The instant case, of course, implicates no First Amendment rights or other fundamental constitutional rights.[22] Nor does it involve punitive legislation

[22] Although a requirement of residence for a specified period within a specified state or locality has a potential impact upon

specifically intended to harm a particular group. Cf. *Johnson* v. *Robison*, *supra*, slip op. at 21, n. 18. Rather, it only involves eligibility for a novel medical insurance program—a form of social welfare legislation reflecting "judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." *Flemming* v. *Nestor*, *supra*, 363 U.S. at 610. The validity of classifications in such programs should be upheld if "the line drawn * * * is rationally supportable, [and] the courts will not interpose their judgment as to the appropriate stopping point." *Geduldig* v. *Aiello*, No. 73–640, decided June 17, 1974, slip op., p. 10; see *Village of Belle Terre* v. *Boraas*, No. 73–191, decided April 1, 1974, slip op., pp. 6–7; *Jefferson* v. *Hackney*, 406 U.S. 535, 546, 549; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Dandridge* v. *Williams*, 397 U.S. 471, 485–487; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 486–488.

In upholding the constitutionality of another provision of the Social Security Act, this Court observed in *Flemming* v. *Nestor*, *supra*, 363 U.S. at 611:

> it is not within our authority to determine whether the Congressional judgment expressed

exercise of a person's constitutional right to interstate travel within the United States (*e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631, 641; *Memorial Hospital* v. *Maricopa County*, No. 72–847, decided February 26, 1974, slip op., pp. 4–6), a mere requirement of residence within the United States does not have that effect. Nor does it impermissibly restrict or penalize the exercise of any constitutionally protected right to foreign travel by aliens who have come to the United States. Cf. *Zemel* v. *Rusk*, 381 U.S. 1, 13–18.

> in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." * * * Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

In considering a proferred "rational basis" for a legislative classification, moreover, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Id.* at 612; see *McGowan* v. *Maryland*, 366 U.S. 420, 426. In addition, under the rational basis test it is not fatal to the validity of a law, as it might be under the "strict scrutiny" test, that the classifications in question are either underinclusive (*Geduldig* v. *Aiello*, *supra*, slip op. at 9–10), or overbroad (*Dandridge* v. *Williams*, *supra*, 397 U.S. at 484–485).

E. THE MEDICARE ACT'S DURATIONAL RESIDENCY REQUIREMENT IS RATIONALLY BASED

The supplementary medical insurance program involved in this case was established by Congress as part of the Health Insurance for the Aged Act of 1965 (79 Stat. 290), the so-called "Medicare" Act.

Like the original Social Security Act of 1935 (49 Stat. 620), which it amended, the Medicare Act is "a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the "general welfare" ' * * *." *Flemming* v. *Nestor*, *supra*, 363 U.S. at 609.

Codified in Subchapter XVIII, Chapter 7, of Title 42, the Medicare Act augmented and was closely tied to the retirement program of the Social Security Act, which is codified in Subchapter II, Chapter 7, of Title 42. The Medicare Act consisted of two major programs: Part A, providing hospital insurance for the aged, financed by a special Social Security tax (42 U.S.C. 1395c–1395i–1), and Part B, providing supplementary medical insurance for the aged, financed equally by general revenues and current premium payments (42 U.S.C. 1395j–1395w). This case involves only eligibility for Part B.

A person eligible for retirement benefits under Subchapter II (or under the similar railroad retirement program), which does not generally distinguish between citizens and aliens,[23] is eligible for benefits

[23] A person is eligible for Subchapter II retirement benefits at age 65 if he has the required number of quarters of coverage—currently 40. 42 U.S.C. 402, 414(a)(2). Employment within the United States is a basis for coverage "irrespective of the citizenship * * * of [the employee] * * *." 42 U.S.C. 410(a). (Eligibility for railroad retirement benefits under 45 U.S.C. 228s–2 also qualifies a person for benefits under Part A.)

Subsequent to the enactment of Parts A and B, eligibility for retirement benefits under Subchapter II was extended to a limited category of otherwise ineligible persons over 72, subject, if they are aliens, to eligibility requirements identical to those contained in Part B. 42 U.S.C. 428(a). This provision was

under Part A (42 U.S.C. 402(a), 1395c),[24] and a citizen or alien eligible for Part A is also eligible for Part B. 42 U.S.C. (Supp. II) 1395*o*(1).

In addition, 65-year old residents of the United States are also eligible for Part B if they are citizens or if they are aliens who (1) have "resided in the United States continuously during the 5 years immediately preceding * * *" enrollment under the program, and (2) have been "lawfully admitted for permanent residence * * *." 42 U.S.C. (Supp. II) 1395*o*(2). These are the requirements whose validity is in issue in this case. Since many aliens are, however, eligible for Part B equally with citizens as a result of their eligibility for Part A benefits, the challenged requirements of Part B have the effect of excluding some, but not all, aliens who do not meet them.

The legislative history of the Medicare Act permits no doubt that Congress intended that aliens should not be eligible for Part B benefits on the same basis as citizens. The only disputed issue before Congress was "the appropriate stopping point" (*Geduldig* v.

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adopted as a floor amendment to the Tax Adjustment Act of 1966 (80 Stat. 67) without presently relevant discussion. 112 Cong. Rec. 5288–5298. It replaced a similar provision enacted in 1965, as part of the Social Security Amendments (79 Stat. 379–380), which contained no limitations as to aliens.

[24] A resident of the United States is also eligible for Part A benefits under certain "transitional" provisions, if he attained 65 before 1968 and, if an alien, has been lawfully admitted for permanent residence and has resided continuously in the United States for the five years preceding application for benefits. 42 U.S.C. 426a.

Aiello, supra, slip op. p. 10) in classifying aliens as eligible, if they did not qualify by reason of being eligible for Subchapter II benefits.

As introduced, and as passed by the House, the Medicare bill (H.R. 6675, 89th Cong., 1st Sess.) made eligibility for Part B open to 65-year-old residents of the United States, except that aliens were eligible only if they had been "lawfully admitted for permanent residence." H. Rep. No. 213, 89th Cong., 1st Sess., pp. 34, 154. Eligibility for Part A depended primarily upon attainment of age 65 and entitlement to retirement benefits under Subchapter II (or under the railroad retirement program). In addition, a "transitional eligibility provision" extended eligibility for Part A benefits to other residents of the United States who did not qualify for retirement benefits, if they had become 65 prior to 1968 and either were citizens or had resided in the United States continuously for the ten years preceding application for benefits. *Id.* at 22–23, 142, 175.

Under the version of the Medicare bill passed by the Senate, eligibility for Subchapter II similarly resulted in eligibility for Part A. S. Rep. No. 404, 89th Cong., 1st Sess., pp. 24–25, 159. However, with respect to both Part B and the transitional provisions for Part A, aliens were eligible only if they had been lawfully admitted for permanent residence and had resided in the United States for the ten years (as to Part B) or six months (as to the transitional provisions) preceding their application. 111 Cong. Rec.

15934–15935; see H. Rep. No. 682, 89th Cong., 1st Sess., 39–40.[25]

In resolving the differences between the House and Senate bills, the conferees made eligibility for Part A result automatically in eligibility for Part B. In addition, the conferees agreed upon the dual requirements for aliens, under both the alternative method of eligibility for Part B and the transitional eligibility provisions for Part A, of five years' residence and lawful admission for permanent residence. H. Rep. No. 682, *supra*, at 8, 12, 39–40. In that form the bill was enacted.

F. THE DISTRICT COURT'S INVALIDATION OF THE STATUTORY RESIDENCY REQUIREMENT WAS UNWARRANTED

The district court concluded that the validity of the residency requirement of Part B should be judged by the "rational basis" test,[26] but then applied that test

[25] As reported to the Senate, the bill had contained ten-year residency requirements for both provisions (S. Rep. No. 404, *supra*, at 25, 39, 170, 194), but the residency requirement for the transitional provision for Part A was reduced to six months by an amendment on the Senate floor, with the suggestion that the conferees consider whether some period between six months and ten years would be more appropriate. 111 Cong. Rec. 15934–15935. The Senate discussion of the alien eligibility provisions indicated the foreign policy dimension of this issue, in that explicit reference was made to the manner in which certain other countries treat citizens of the United States and other countries with respect to eligibility for comparable social welfare legislation. *Id.* at 15935.

[26] The district court assumed without discussion that the deferral of appellee's eligibility for supplemental medical benefits under Part B constituted a deprivation of their "property." But the statute creating those benefits had been enacted before appellees came to the United States and placed themselves in the assertedly disfavored category. Hence, application of the challenged eligibility provisions does not deprive appellees of receipt of any statutory expectancy. Cf. *Arnett* v. *Kennedy*, No. 72–1118, decided April 16, 1974, slip op., pp. 16–20 (plurality opinion of Rehnquist, J.). Moreover, appellees Diaz and Clara, in entering the United States on a parole basis (see p. 3, *supra*), voluntarily accepted a traditionally tenuous legal status, the established prerogatives of which they are now seeking to enlarge. Compare *Leng May Ma* v. *Barber*, 357 U.S. 185, 188–189; cf. *id.* at 192 (Douglas, J., dissenting).

in an inappropriately hypercritical manner (cf. *Johnson* v. *Robison*, *supra*, slip op. at 15–16), with inadequate regard for the extraordinary power of Congress to legislate concerning aliens and the extensive deference ordinarily due to congressional judgments in such matters. The limitation on the eligibility of aliens for Part B imposed by Congress may be seen as reflecting a policy judgment concerning the desirable degree of attachment to this country requisite for a noncitizen to enjoy one of the varied statutory privileges of a citizen in the field of social welfare. In rejecting that judgment and in finding the durational residency requirement invalid, the district court was in reality substituting its own judgment on this matter of legislative policy, and in doing so it exceeded the proper bounds of judicial scrutiny in such cases.

Thus, acting on the assumption that "some aliens may legitimately be excluded from the supplemental medical benefits program * * *," the court concluded that the durational residency requirement was "invidiously discriminatory," if not "arbitrary and without rational basis," because the classification was

impermissibly "overbroad [in] that it excludes almost all aliens *qua* aliens * * *" (J.S. App. 31–32).[27] In employing the concept of "overbreadth," however, the court improperly applied to social welfare legislation a degree of strict scrutiny previously employed by this Court only where the challenged governmental action burdened the exercise of protected constitutional rights or was based upon a criterion as to which the government in question had limited power to act. See pp. 18–22, *supra*.

As we have noted, Congress has not entirely excluded aliens from eligibility for Part B benefits, though it had the power to do so. The durational residency requirement imposes on some aliens (those not eligible for Part B through eligibility for Part A) a requirement of substantial and enduring connection with the United States which Congress may rationally impose in extending to aliens the "different privileges of Citizenship * * *." 2 Farrand, *supra*, at 235. In searching for what it deemed a rational justification for the line drawn by Congress between aliens who are eligible and those who are not, the district court totally ignored the unique legal status of aliens in their relationship to the federal government. Indeed,

[27] The record does not support the court's premise that the five-year residency requirement would exclude "almost all aliens." Many aliens who have not resided continuously in the United States for the five years preceding their application for Part B might nevertheless, during earlier periods of residence, have become eligible for retirement-benefits and hence eligible under for both Part A and Part B.

the court's approach, if sustained, would threaten the validity of "an entire Title of the United States Code" (cf. *Morton* v. *Mancari*, *supra*, slip op. at 17) and many other laws as well—a result not required by the Fifth Amendment.

In view of the unique legal status of aliens, Congress' broad legislative power with respect to them, and the limited judicial scrutiny to which the rationality of social welfare legislation is subject, the five-year residency requirement for aliens under the alternative basis of eligibility for Part B benefits should have been upheld by the district court as a rational and valid exercise of congressional authority.

The differentiation between aliens and citizens reflected in 42 U.S.C. (Supp. II) 1395*o*(2)(B) as to duration of residency is one that was specifically anticipated by the Constitution's Framers (see p. 14, *supra*), and the general distinction between citizens and aliens has been recognized by Congress throughout our history (see pp. 15–17, *supra*). This classification does not offend due process now any more than it did when the Bill of Rights was adopted.[28]

[28] This case does not involve an effort by Congress to distinguish among aliens on the basis of some suspect category, such as race or religion, nor does it involve Congress' use of a person's alienage as a device for legislating with respect to matters that might otherwise be beyond its constitutional authority. Compare *Keller* v. *United States*, 213 U.S. 138. Accordingly, the Court need not consider here the outer limits of Congress' power to legislate with respect to aliens.

II. THE REQUIREMENT IMPOSED BY CONGRESS THAT ALIENS BE "LAWFULLY ADMITTED FOR PERMANENT RESIDENCE" IS SEVERABLE FROM THE DURATIONAL RESIDENCE REQUIREMENT AND IS CONSTITUTIONAL

After holding the requirement of five years' residence for certain aliens to be unconstitutional, the district court expressed doubt about the constitutionality of the requirement that those aliens also be "lawfully admitted for permanent residence" to be eligible for supplementary medical insurance benefits under Part B (J.S. App. 39–40), but held instead that it was invalid and unenforceable because it was inseparable from the durational residency requirement (J.S. App. 33–38). The court's ruling on the severability of this requirement was erroneous and the doubts about its constitutionality were unfounded.

A. The proper approach to the severability question was recently summarized by this Court in *Tilton* v. *Richardson*, 403 U.S. 672, 684:

> "The cardinal principle of statutory construction is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). In *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234 (1932), the Court noted
>
> > "The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

See also *United States* v. *Jackson*, 390 U.S. 570, 585.

As we have noted (see p. 25, *supra*), the versions of the Medicare bill originally enacted by the House and the Senate both included, as part of the basis for eligibility for Part B, the requirement that an alien have been "lawfully admitted for permanent residence." The bills differed, as to Part B, only in that the Senate bill also included a durational residency requirement (see p. 25, *supra*). Since Congress has on other occasions required that aliens be lawfully admitted for permanent residence in order to qualify for various benefits available to citizens (see p. 16, *supra*, n. 16), it is evident that Congress would have imposed that requirement here even if the durational residency requirement were beyond its power.

The district court acknowledged that the general savings clause of the Social Security Act (42 U.S.C. 1303) created at least a "presumption of separability" (J.S. App. 38), noted that the officials responsible for administering Part B treated the dual alien eligibility requirements as being separate criteria (*id.* at 36, n. 20), and concluded that "reasonable men might differ on this question" of severability (*id.* at 37). Nevertheless, rather than seeking to sustain the validity of the "lawfully admitted" requirement, the court held that the entire alien eligibility "must stand or fall as an entity" (*id.* at 38), because, according to the court's reading of the legislative history of the other provisions of Part B and Part A, they were part of a legislative "compromise" (*id.* at 36–38, n.21).

The district court erred, however, in thus relying upon its speculation concerning the essentially political question whether the proponents of one version of the bill would have agreed to recede on one point if they had not gained a concession on another. The test is, rather, whether Congress would have viewed the two parts of the law as being so integrally related as a matter of policy that it would have had no logical reason to enact one part if it could not validly enact the other.

Moreover, even under the district court's approach, the inclusion of a "lawfully admitted" requirement for Part B in both bills, and the lack of any dispute about this requirement, lead to a conclusion precisely opposite to that reached by the court.[29]

The error of the court's ruling on severability is further demonstrated by consideration of its consequences. By holding that Congress would have preferred no limitations on alien eligibility for Part B

[29] The court stressed the fact that, prior to enactment of the Medicare Act, the only provision joining a durational residence requirement for aliens with a "lawfully admitted" requirement was that in 8 U.S.C. 1427(a), governing eligibility for naturalization (J.S. App. 35, n. 19, 37, n. 21, 38, n. 23). While that appears to be true, at least as to laws presently in effect, that fact sheds little light on the question whether Congress, if it had known that the durational residency requirement was beyond its power, would have intended that aliens be eligible for Part B without limitation, or whether it would still have intended the "lawfully admitted" requirement to be given effect. Indeed, assuming *arguendo* that the durational residence requirement of the naturalization law were beyond Congress' power, it is not readily conceivable that Congress would have omitted from that law the requirement of "lawful admission for permanent residence."

if it could not impose a durational residency requirement, the court has in effect opened up Part B to all categories of aliens, including not only those residing here temporarily and having no attachment to this country (*e.g.*, diplomats), but also those here unlawfully. It is highly unlikely that the Congress that imposed the dual eligibility requirements of Section 1395*o*(2)(B) would have intended that result.

B. The constitutionality of the requirement that an alien be "lawfully admitted for permanent residence" stands at least on the same principles discussed concerning the residency requirement (see pp. 26–29, *supra*). Moreover, as this Court has indicated in other contexts, a residency requirement may be valid where a durational residency requirement would not. *Shapiro* v. *Thompson, supra,* 394 U.S. at 636; *Dunn* v. *Blumstein,* 405 U.S. 330, 342–344; *Marston* v. *Lewis,* 410 U.S. 679, 680; *Vlandis* v. *Kline,* 412 U.S. 441, 452–453. In the present case the requirement that an alien be "lawfully admitted for permanent residence" is rationally calculated to exclude from eligibility illegal entrants or other potentially long-term residents, such as diplomats and foreign correspondents, who lack a substantial and enduring tie to the United States.[30]

[30] For many, including appellees Diaz and Clara, the "lawfully admitted" requirement does not constitute a permanent exclusion. A parolee from Cuba may obtain adjustment of status to that of a person lawfully admitted for permanent residence after being physically present in the United States for two years if he meets the requirements for admission as a permanent resident (80 Stat. 1161, 8 U.S.C. 1255, note); admission as a permanent resident then depends upon the number of prior applicants relative to the applicable numerical limita-

Such a provision, even if not surgically precise, is within Congress' plenary power to legislate with respect to aliens.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
GERALD P. NORTON,
Assistant to the Solicitor General.
STEPHEN F. EILPERIN,
DAVID M. COHEN,
Attorneys.

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tion (8 U.S.C. 1151(a)), the waiting period for Cuba currently being about two years. The record does not reveal whether Diaz and Clara have sought adjustment of their status and admission for permanent residence, which they each became eligible to do in 1973. Many aliens in the position of appellees Diaz and Clara, who initially were not "lawfully admitted for permanent residence" because they were paroled into the United States as refugees, still hope to return to their homeland if political conditions there change sufficiently. It is natural that one in such a position might have a less substantial attachment to the United States than one who immigrated here in the usual manner and hence was "lawfully admitted for permanent residence."

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